FILE COPY

Office - Supreme Court, U.S.
FILED
MAR 31 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 709

TONY TUDRYCK and MARY TUDRYCK, his wife,
Petitioners,

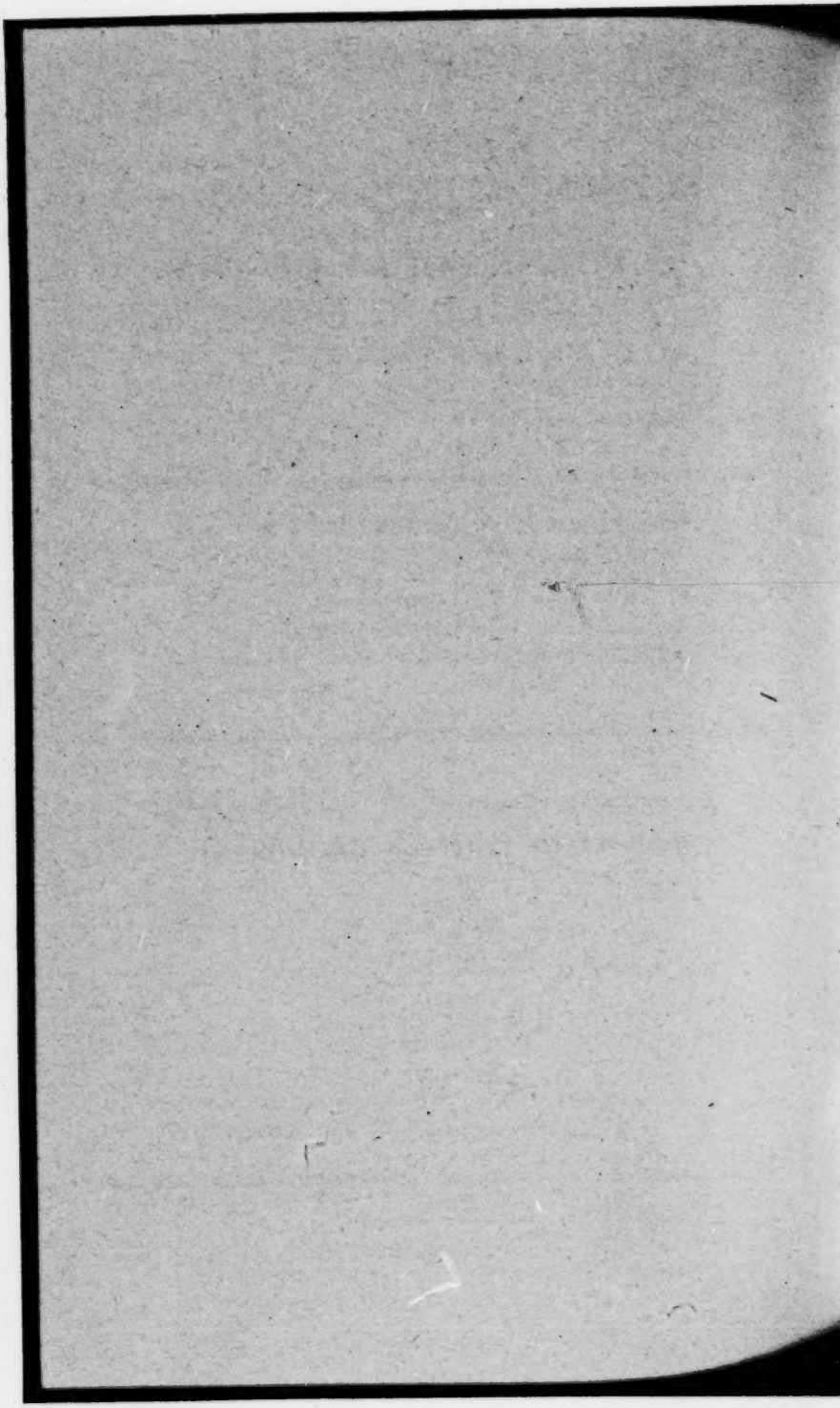
vs.

JOSEPH MARTIN, Receiver of the Sterling Bank of Sleeper and Chamberlain, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONERS TUDRYCK

HARRY J. LIPPMAN,
Attorney for Petitioners.
Business Address:
910 Majestic Building,
Detroit 26, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.....

TONY TUDRYCK and MARY TUDRYCK, his wife,
Plaintiffs, Appellants and Petitioners,

vs.

J. O. MUTCH, ETC., Cashier of Sterling Bank of Sleeper and Chamberlain, et als.,

(JOSEPH MARTIN, Receiver of Sterling Bank of Sleeper and Chamberlain,
Defendants, Appellees and Respondents),
and

ANDREW SMYL and VICTORIA SMYL,
Defendants and Appellants.

PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully show unto the Court as follows:

I. STATEMENT OF MATTER INVOLVED.

1. On August 16, 1938, the bill of complaint in this cause involved was filed in the Chancery Division of the Circuit Court for the County of Arenac, Michigan, to have a certain deed dated in 1924 and a certain land contract

dated in 1934 under which the defendant bank was asserting full ownership decreed as mortgages, the underwriting on the summons issued giving notice of injunctive relief, accounting and removal of clouds from title and decree construing deed and contract as mortgage (R. 4, 33).

2. The relief as prayed for in said bill of complaint in preceding paragraph referred to was as follows (R. 22):

(a) Answer.

(b) Injunctive relief.

(c) "That this Court decree that the deed executed by your plaintiffs and defendants Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife, unto said defendant J. O. Mutch, as cashier of said bank, so legally constituted as aforesaid, on the 22nd day of November, A. D. 1924, and recorded in the office of the Register of Deeds for Arenac County, Michigan, in Liber 56 of deeds, page 616, was and is in truth and in fact a deed executed in the nature of security and as a mortgage, and was and is in truth and in fact a mortgage given in cancellation and discharge of the two previous mortgages theretofore by your plaintiffs and said defendants Smyl executed unto said defendant, the former under date of October 22nd, A. D., 1923, and the latter under date of November 22nd, A. D., 1934, and recorded in the office of the Register of Deeds of Arenac County, Michigan, respectively in Liber 35 of Mortgages page 452, and Liber 35 of Mortgages, page 470, and that this Court further decree that all clouds upon the title of said premises by reason thereof be forthwith discharged and removed from record."

(d) "That this Court decree that the so-called land contract, Exhibit A, attached to this bill of complaint herein now filed, and made to form a part hereof, was executed merely as represented evidence of the state of account between your plaintiffs and said defendants Harvey A. Chamberlain, J. O. Mutch, John Doe, Richard Roe, Jane Doe and Mary Roe, as co-partners doing business as the Sterling Bank of Sterling, Michigan, also known as the Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank, and defendant J. O. Mutch, as

cashier of said bank, or either of them, and is void and of no force and effect."

(e) Accounting.

(f) For discharge of liability and for payment of moneys.

(g) "That each and every cloud upon the title to the premises in this cause involved, by reason of the conveyances now of record, or not of record, be decreed removed therefrom, and that this Court decree that your plaintiffs herein be the owners of the fee of the premises in this cause involved, free, clear and discharged of all obligations unto said defendants Harvey A. Chamberlain, J. O. Mutch, John Doe, and Richard Roe, Jane Doe and Mary Roe, whether individually or as co-partners doing business as the Sterling Bank of Sterling, Michigan, also known as the Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank, and defendant J. O. Mutch, both in his individual capacity and as cashier of said bank."

(h) General relief.

3. On October 3, 1938, answer and cross bill was filed in this cause by defendants Mutch and Chamberlain, at that time cashier and owner respectively of the bank in question (R. 45) and in which answer the claim of mortgage obligation as asserted by the plaintiffs was admitted, these defendants through cross bill, and under claim that the mortgage obligation was in default, seeking a statutory foreclosure of same.

4. The relief as prayed for in the cross bill of complaint in preceding paragraph referred to was as follows (R. 69):

(1) For accounting under mortgage obligation.

(2) For payment of moneys found due on accounting.

(3) "And in default thereof, that the cross-defendants herein named, and each of them, and all persons claiming or to claim from or under them, may be foreclosed and barred of and from all equity of redemption and claim of, in and to said mortgaged premises, and every

part and parcel thereof, with the appurtenances, except that part which was conveyed to Stanley and Paulina Neidewicki as aforesaid."

(4) "And that all and singular the said mortgaged premises, with the appurtenances, may be sold by the order and decree and under the direction of this Court, and the moneys arising from the sale thereof, so far as shall be necessary, or so far as the same shall extend, be applied toward satisfying the cross-plaintiff, Harvey A. Chamberlain, the full amount of the moneys so as aforesaid secured in and by the said indentures of mortgage and deed operating as a mortgage, both principal and interest, if the whole shall then be due and unpaid."

(5) "And that the said cross-defendants and all persons claiming and to claim under them or either of them, or who have come into possession of the said mortgaged premises, or any part or portion thereof during the pendency of this suit, deliver and yield up possession thereof to cross-plaintiff, Harvey A. Chamberlain, or to whomsoever shall become the purchaser or purchasers thereof at the said sale, on his, her or their producing to him or them, or to the person or persons in possession of the said mortgaged premises, or of any part thereof, the deed or deeds executed by the special commissioner pursuant to such sale as aforesaid, and a certified copy of the order confirming the report of such sale, after such order has become absolute."

(6) For deficiency in event sale price not sufficient.

(7) General relief.

5. At the time of the institution of the within proceeding, the defendant bank was not in receivership, this receivership however, having resulted in October, 1938, one Joseph Martin, the present receiver, having been appointed temporary receiver thereafter and he upon petition and consent of counsel having been intervened in said cause by order of the trial court under date of November 7, 1938, he on that same day having filed in this cause regular acceptance of the answer and cross bill filed herein by the defendants Mutch and Chamberlain. (R. 88).

6. On June 14, 1939, this cause came on for trial and disposition before the Honorable John C. Shaffer, Circuit Judge, proofs having been adduced under dates of June 14, 15 and 16, 1939, with suspension of proofs on this latter date due to the death of defendant Chamberlain (see calendar entries R. 1).

7. Following interruption of proofs as in preceding paragraph stated, informal check up of the books of the bank was undertaken on behalf of the plaintiffs with the result that an indebtedness to the bank owing by themselves and defendants Smyl in the sum of $3,000 was disclosed, a cancellation of this liability together with the payment of the sum of $300 constituting the consideration for which stipulation and decree settling the controversy in question was filed in this cause under date of January 27, 1940 (R. 97, 100).

8. Notwithstanding the fact that neither the plaintiffs in their bill of complaint nor the defendant-receiver under cross bill sought or prayed that title in fee to the premises in this cause involved be decreed in the defendant-receiver, yet the trial court upon stipulation of counsel made such finding under decree in preceding paragraph referred to and which provision in this regard as found in said decree reads as follows (R. 100):

> "The court being fully advised as to said settlement, and after consideration of the testimony in said cause, IT IS ORDERED, ADJUDGED AND DECREED that said H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain, shall pay to Tony Tudryck and Mary Tudryck, his wife, the sum of Three Hundred Dollars, that thereupon said Tony Tudryck and Mary Tudryck, his wife, shall by good and sufficient conveyance executed by them as grantors, and said H. L. Switzer, Receiver as aforesaid, as grantee, convey all their right, title and interest in and to those certain pieces and parcels of land situated in the Township of Deep River, County of Arenac, State of Michigan, known and described as follows, to-wit:
>
> The West Half of the East Half of the North East Quarter and the East Half of the West

Half of the North East Quarter and the West Half of the East Half of the South East Quarter and the East twenty acres of the West Half of the South East Quarter, all in Section number Eight, Township number Nineteen North of Range Four East

Which said conveyance shall include transfer of all equity of redemption from interest in mortgaged premises and interest in premises being purchased under land contract by said Tony Tudryck and Mary Tudryck referred to in the pleadings filed in this cause, and that said conveyance shall include transfer of all hereditaments and appurtenances on the surface of said land and premises and any mineral and other rights incident to said land under the surface, and any interest in oil and gas lease or leases covering said premises, or any part thereof, now held by said Tony Tudryck and Mary Tudryck, his wife, or parties claiming by virtue of transfer or assignment from them.

"IT IS FURTHER ORDERED that said deed shall be delivered to said H. L. Switzer, Receiver as aforesaid, upon payment of the sum of Three Hundred Dollars, and that said receiver upon entry of this decree, shall become immediately seized of said premises and have immediate possession of the same, free and clear of any claim or interest of said Tony Tudryck and Mary Tudryck, husband and wife.

"It is FURTHER ORDERED, ADJUDGED AND DECREED that upon payment of said sum of Three Hundred Dollars as above provided, that said premises shall thereupon be held in fee simple by said H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain, free and clear of any claim or interest therein on the part of said plaintiffs or on the part of said J. O. Mutch, or Harvey A. Chamberlain."

9. On October 31, 1944, plaintiffs filed in the court below their verified petition for the setting aside and vacating of the decree in preceding paragraph referred to, the principal reason, among others assigned, being that there had in this case been want of due process in violation of the Fourteenth Amendment of the Constitution of the United States of America, in that the court had under the decree as entered granted relief not in said proceedings sought (R. 125), and to one not a proper party to the action.

10. On June 30, 1945, following argument of motion to vacate decree as in preceding paragraph explained, and submission of briefs by all counsel in connection therewith, opinion was filed by the trial court denying said petition to vacate (R. 207) an order in pursuance thereof having been signed, filed and entered in said cause some ten months later, and under date of April 23, 1946 (R. 219), the opinion as filed without application therefore on behalf of the respondents intervening as party defendant in the place of Joseph Martin, temporary receiver, one H. L. Switzer as permanent receiver (R. 208), an order of such intervention also having been signed, filed and entered in this cause by the trial court under date of April 23, 1946 (R. 221).

11. On May 31, 1946, petition was filed on behalf of the plaintiffs to vacate and strike the order of intervention as in preceding paragraph referred to (R. 227), this petition, however, having been heard and denied by the trial court with order filed in connection therewith on July 8, 1946 (R. 250).

12. Claiming themselves to be aggrieved by the order of the trial court in having denied their petition to vacate decree and order intervening permanent receiver as in previous paragraphs described, application in accord with the court rule and statute for leave to appeal in the nature of mandamus was filed in the Supreme Court of the State of Michigan (R. Vol. I, 271), such application having subsequently been granted with the result that said cause was regularly docketed and regularly heard as a fully contested matter before the Supreme Court of the State of Michigan under date of October 14,

1947 (R. Vol. I, 271), with decision rendered by the Supreme Court of the State of Michigan affirming the decision of the court below under date of January 6, 1948 (R. Vol. I, 275-281), this cause now being fully reported in Volume 320, Michigan Reports, page 99, and to which reference is here prayed.

13. That in opinion filed by the Supreme Court of the State of Michigan it was held that no constitutional question was involved (R. Vol. I, 281), all of which finding, however, in opinion of your petitioners was contrary to law and fact in that the due process provision of the Fourteenth Amendment of the Constitution of the United States of America was abridged through the courts having declared title in fee in the premises in said cause involved in the bank receiver, notwithstanding that nowhere within said proceeding was any such claim for and on behalf of the bank receiver asserted, and notwithstanding the fact that so far as the bank and its receiver be concerned, the only relief by them or either of them in said proceeding sought was the statutory foreclosure of the obligation admitted to be a mortgage obligation (R. 45).

14. That the actual amount involved in the within controversy is in excess of the sum of $100,000 (R. 132) there already at the time of the original hearing of the petition in the court below being in excess of the sum of $40,000 in cash as oil royalties for the pumping of oil on the land in question in the hands of the bank receiver, and which said lands in this cause involved so containing said oil was under the decree herein now sought to be vacated, granted unto the respondent receiver herein, in consideration of cancellation of the $3,000 liability and the payment of $300 in cash (see paragraph 7 above) and which latter $300 was heretofore tendered in return to the bank receiver and refused (R. 200), the entire transaction thus involved being a grossly unconscionable one well within the meaning of the Fourteenth Amendment of the Constitution of the United States of America through depriving the petitioners of property without due process.

II.

STATEMENT OF JURISDICTION

15. Petitioners claim that this court has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan, to review its affirmance on January 6, 1948, of the order of the trial court, under the provisions of the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936, as amended, Section 237(b) thereof, which provides as follows:

> "Sec. 237(b). It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination, with the same power and with like effect as if brought up by writ of error, any cause wherein *a final judgment or decree* has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where *any title, right, privilege or immunity* is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States and the power to review under this paragraph may be exercised as well where the Federal Claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

III.

QUESTIONS PRESENTED

16. The questions presented by this petition for Writ of Certiorari are as follows:

Was and is not the decree as entered in the court below, vesting title in fee simple to the premises in said cause involved in the bank receiver, notwithstanding that no such relief was any where within the proceedings involved sought, and notwithstanding the fact that the relief granted was to one not a party to the suit, void

(a) Because it deprived the petitioners herein of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States of America, and

(b) Because it denied to petitioner the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

IV.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT OF CERTIORARI

17. Petitioners rely upon the following reasons as to why this court should issue its Writ of Certiorari:

(a) Because a State Court has decided a federal question in a way probably not in accord with applicable decisions of this Court.

(b) Because the Supreme Court of the State of Michigan did through the entry of opinion as in this cause filed, neglect, fail and refuse to find that a Constitutional question was involved.

(c) Because the conclusion of the Supreme Court of the State of Michigan that no Constitutional question was involved was erroneous and contrary to the heretofore announced decisions of this Court in like cases made and provided.

(d) Because this question of want of due process in violation of the Fourteenth Amendment of the Constitu-

tion of the United States of America on occasions similar to the case here at bar has heretofore many times been determined by this Court which has repeatedly held that there is such a violation of such Constitutional provision when the relief in proceedings granted be outside of the purview of the relief sought.

(e) Because in affirming the order of the lower court denying unto petitioners vacation of decree as in said proceeding signed, filed and entered, the Supreme Court of the State of Michigan permitted the respondent receiver herein, not a party to this suit, to acquire title in fee simple to the premises in this cause involved without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States of America.

(f) Because in affirming the order of the lower court denying unto petitioners vacation of decree as in said proceeding signed, filed and entered, the Supreme Court of the State of Michigan permitted the respondent receiver herein to acquire title in fee simple to the premises in this cause involved and did thereby deny unto the petitioners herein the equal protection of the law as guaranteed unto them by the Fourteenth Amendment of the Constitution of the United States of America.

(g) Because the action of the Supreme Court of the State of Michigan in affirming the refusal of the lower court to vacate the decree herein by the petitioners sought was such and is such as to permit the respondent bank receiver to acquire the valuable oil premises in the cause involved and worth hundreds of thousands of dollars for the sum of $300 heretofore tendered in return to the respondent receiver herein and by him refused (R. 200), certainly most inequitable and unconscionable and in violation of the equal protection of the law and due process provisions of the Fourteenth Amendment of the Constitution of the United States of America.

WHEREFORE these petitioners pray that a Writ of Certiorari issue out of this Court directed to the Supreme Court of the State of Michigan, to review the decision of that court under date of January 6, 1948, affirming the

order of the trial court denying petitioners' application to vacate decree as entered in the court below.

Tony Tudryck,
Mary Tudryck,
Petitioners.

Harry J. Lippman,
Attorney for Petitioners.
910 Majestic Building,
Detroit, Michigan.

STATE OF MICHIGAN
SS
COUNTY OF WAYNE

On this 1st day of March, 1948, before me, a Notary Public in and for said county, personally appeared TONY TUDRYCK and MARY TUDRYCK, his wife, petitioners named in the foregoing petition, who made oath and said that they have read the foregoing petition by them subscribed, and know the contents thereof, and that the same is true of their own knowledge, except as to those matters therein stated to be upon information and belief, and as to those matters, they believe them to be true.

Richard L. Murphy,
Notary Public, Wayne Co., Mich.
My Comm. expires May 12, 1951.

(SEAL)

STATE OF MICHIGAN
SS
COUNTY OF WAYNE

HARRY J. LIPPMAN, of the City of Detroit, above State and County, being first duly sworn, deposes and says that on the 23rd day of March, 1948, he did serve a true copy of the attached Petition for Writ of Certiorari upon Messrs. Yeo & Bilitzke, Attorneys for Respondents, by personally enclosing a true copy of same to them in an envelope addressed at their offices in West Branch, Mich-

igan, and by then depositing such envelope duly sealed with postage fully prepaid thereon in the United States mail in Detroit, Michigan.

Harry J. Lippman

Subscribed and Sworn to before me this
23rd day of March, 1948.

Richard L. Murphy,
Notary Public, Wayne County, Mich.,
My Commission expires: May 12, 1951.

FILE COPY

FILED
MAR 31 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 709

TONY TUDRYCK and MARY TUDRYCK, his wife,
Petitioners,

vs.

JOSEPH MARTIN, Receiver of the Sterling Bank of Sleeper and Chamberlain, et al,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONERS TUDRYCK

HARRY J. LIPPMAN,
Attorney for Petitioners.
Business Address:
910 Majestic Building,
Detroit 26, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

INDEX TO BRIEF

	Page
I. Preliminary Statement	1
II. Statement of Facts	3
III. Questions Presented	10
IV. Jurisdictional Statement	11
V. Reasons Relied on for Issuance of Writ of Certiorari	12
VI. Argument	13
A. The decree as entered in the court below void, same being in violation of the Fourteenth Amendment of the Constitution of the United States of America both as to want of due process and equal protection of the law	13
(a) The Court without jurisdiction due to want of due process	14
(b) What is due process	15
(c) To constitute due process, relief granted must be in accord with the relief sought	16
(d) To constitute due process the court among other things must have jurisdiction of the person	27
B. Jurisdiction may not be conferred by consent	32
C. The Fourteenth Amendment to the Constitution of the United States of America requiring equal protection of the law makes mandatory conscionable transactions	38
VII. Conclusion	42
VIII. Relief Sought	46

INDEX TO AUTHORITIES CITED

DECISIONS:

	Page
Anway vs. R. R. Co., 211 Mich. 592	35
Ballance vs. Forsyth, 62 U. S. 389	32
Bennett vs. Associated Theaters, 247 Mich. 493	28
Chicago B&CR Co. vs. Chicago, 166 U. S. 226, 234, 247	21
Clark vs. Paul Gray, 306 U. S. 583	33
Coe vs. Armour, 273 U. S. 413	22
Colclough vs. Sterum, 3 Bligh 181, 186	20
Collen vs. Sooy, 172 Mich. 214	27
Corwithe vs. Griffing, 21 Barb. 9	20
Curtis vs. Curtis, 250 Mich. 105	30
Duchess of Kingstons Case, 2 Smith Lead. Cases 535	20
Electrotype Co. vs. Powers-Tyson Co., 245 Mich. 669	24, 35
Estate of Fraser, 288 Mich. 392	25
Estate of Meredith, 275 Mich. 278	36
443 Cans of Frozen Egg Products, re 226 U. S. 172	32
Freeman vs. Wayne Probate Judge, 230 Mich. 455	32
Frost vs. Atwood, 73 Mich. 67	36
Giffard vs. Hort, 1 Sch. & Lef. 386, 408	20
Goldberg vs. Elmwood Cemetery, 281 Mich. 647	36
Gore vs. Stacpoole, 1 Dow 18, 30	20
Greenvault vs. Farmers & Mechanics Bank, 2 Doug. 498	37
Hague vs. C. I. O., 307 U. S. 496	10
Halke, In re vs. Douglas, 267 Mich. 600	36
Hartz Co. vs. Lukaszcewski, 200 Mich. 230	35
Janower vs. F. M. Sibley Lumber Co., 245 Mich. 571	36
Jenks vs. Quidnick Co., 135 U. S. 457	39
Johnson vs. Shepard, 35 Mich. 115	27
Kelly vs. Gankler, 184 Mich. 159	27
Kelsey vs. Forsyth, 62 U. S. 85	32
King vs. Hamilton, 4 Pet. 311	41

DECISIONS:

	Page
Lehman vs. Lehman, 312 Mich. 102	26
Lindsell vs. Halicki, 240 Mich. 483	42
Mallory vs. Ward Baking Co., 270 Mich. 91	31
Marks vs. Gates, 83 C. C. A. 321, 154 Fed. 481	40
Maslen vs. Anderson, 163 Mich. 477	23
Mississippi & M. R. Co. vs. Cromwell, 91 U. S. 643	42
Munday vs. Vail, 34 N. J. L. 418	18
People vs. Melocke, 186 Mich. 536	36
Perkins vs. Hayward, 132 Ind. 95, 101	32
Pope Mfg. Co. vs. Gormully, 144 U. S. 224	41
Radford vs. Myers, 231 U. S. 725	22
Rees vs. Watertown, 19 Wall. 107, 123	22
Reynolds vs. Stockton, 140 U. S. 254	17, 22
Schooner Lucy, The vs. U. S., 75 U. S. 307	32
Scott vs. McNeil, 154 U. S. 34	15
Shane vs. Himelstein, 227 Mich. 465	35
Snyder vs. Massachusetts, 291 U. S. 97, 78 L. Ed. 674	23
Standard Oil Co. vs. Missouri, 224 U. S. 270	21
Stolte vs. Krentel, 271 Mich. 98	36
Stratton vs. St. L. & S. W. R., 282 U. S. 18	32
Straus vs. Barbee, 262 Mich. 113	36
Swift & Co. vs. Hocking Valley R. Co., 243 U. S. 281	32
Town of Elgin vs. Marshall, 106 U. S. 578	32
Township of Warren vs. Raymond, 291 Mich. 426	25
Unfried vs. Heberer, 63 Ind. 67	20
Union Trust Co. vs. Detroit Trust Co., 243 Mich. 451	27
U. S. vs. Corrick, 298 U. S. 438	32
Warner vs. Noble, 286 Mich. 654	24
Willard vs. Tayloe, 8 Wall. 567	41
Wilson vs. Farmers Mut. Fire Ins. Co., 184 Mich. 530, 533	28
Winn, Frank D., Re vs. U. S., 213 U. S. 458	32
Winsor vs. McVeigh, 93 U. S. 274, 282	22
Wisser vs. Wayne Circuit Judge, 247 Mich. 52	36
Wurzer vs. Geraldine, 268 Mich. 286	27

STATUTES:

	Page
Act of Congress of Feb. 13, 1925, Ch. 229	11
Compiled Laws of Mich. 1929, Sec. 14019 (Mich. Stat. Ann. 27.663)	29
Fourteenth Amendment to Constitution of United States	13
U. S. C. A. Vol. 11, Sec. 29	28
U. S. C. A. Vol. 28, Sec. 41(1)	33

TEXTBOOKS AND REFERENCE BOOKS:

Alderson on Receivers, Sec. 578	28
Amer. Jur. Vol. 14, Courts, 184	33
Beach on Receivers, Sec. 708	28
Black (2nd Ed.) Void & Voidable Judgments, Sec. 170	37
Clark on Receivers (2) Sec. 610, 616	28
Coke on Lit., 352 b	20
C. J. S., Vol. 8, Sec. 212, p. 693-695	28
High on Receivers, Sec. 258	28
R. C. L., Vol. 10, p. 841, Judgments, Sec. 316	15
R. C. L., Vol. 10, p. 555, Equity, Sec. 338	16
R. C. L., Vol. 15, p. 604, Judgments, Sec. 43	16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. .....

TONY TUDRYCK and MARY TUDRYCK, his wife,
Plaintiffs, Appellants and Petitioners,

vs.

J. O. MUTCH, ETC., Cashier of Sterling Bank of Sleeper and Chamberlain, et als.,

---

(JOSEPH MARTIN, Receiver of Sterling Bank of Sleeper and Chamberlain,
Defendants, Appellees and Respondents),
and

ANDREW SMYL and VICTORIA SMYL,
Defendants and Appellants.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONERS TUDRYCK

I.

PRELIMINARY STATEMENT

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

This brief is filed in support of a petition for writ of certiorari to the Michigan Supreme Court to review its affirmance of an order of the Trial Court denying peti-

tioners' application for an order setting aside and vacating a decree as entered in a chancery action based upon a stipulation of counsel for certain of the parties to that proceeding and under which stipulation relief not prayed for in the bill of complaint or in the cross bill of complaint as in that proceeding filed was granted unto the cross-appellant therein.

The petitioners in this proceeding are the plaintiffs and appellants in the court below, it being they who prior to the stipulation and decree in this proceeding involved were the owners of the fee of the lands herein concerned and to the title of which lands they were divested under stipulated decree in the court below which granted unto the appellee receiver title in fee in the premises involved for the sum of $300 and the cancellation of a $3,000 liability, and which $300 was heretofore tendered in return to this receiver and by him refused (200).

The appellee herein is the defendant receiver of the private bank in this cause involved, heretofore owned by one Harvey A. Chamberlain, now deceased, and upon his death passing into the hands of his estate.

The premises in this cause involved are lands lying and being situated in the township of Deep River, Arenac County, Michigan, consisting of one hundred forty acres of land and on which oil was discovered in the Spring of 1944, considered among the best oil strikes in the history of the State of Michigan, and which said oil lands by reason of such discovery of oil is worth in excess of the sum of a million dollars, a figure by the appellee and respondent herein disputed, but which lands he himself advises are necessary of ownership by him in order to pay off the bank's obligations in excess of the sum of $100,000 (132-142).

It is the claim of the petitioners herein that by reason of the decree as entered in the court below upon stipulation of counsel and which granted unto the cross-appellant, the respondent receiver herein, ownership in fee in the premises in this cause involved notwithstanding that no such relief was anywhere within the proofs or pleadings referred to or asserted, the petitioners were deprived

of their property without due process of law and with denial unto them of the equal protection of the law to which they are entitled, all in violation of the Fourteenth Amendment of the Constitution of the United States of America, it being also their claim that by having under such stipulated decree granted unto the respondent receiver herein lands worth in excess of the sum of $100,000 for the sum of $300 and the cancellation of a $3,000 liability, the Fourteenth Amendment of the Constitution of the United States of America had further application in that through such award it did deny unto the petitioners herein the equal protection of the law to which they were and are entitled.

II.

STATEMENT OF FACTS

On August 16, 1938, the bill of complaint in this cause involved was filed in the Chancery Division of the Circuit Court for the County of Arenac, Michigan, to have a certain deed dated in 1924 and a certain land contract dated in 1934 under which the defendant bank was asserting full ownership decreed as mortgages, the underwriting on the summons issued giving notice of injunctive relief, accounting and removal of clouds from title and decree construing deed and contract as mortgage (4, 33).

The relief as prayed for in said bill of complaint in preceding paragraph referred to was as follows (22):

(a) Answer.

(b) Injunctive relief.

(c) "That this Court decree that the deed executed by your plaintiffs and defendants Andrew Smyl, also known as Andrew Smaiel, and Victoria Smyl, also known as Victoria Smaiel, his wife, unto said defendant J. O. Mutch, as cashier of said bank, so legally constituted as aforesaid, on the 22nd day of November, A. D., 1924, and recorded in the office of the Register of Deeds for Arenac County, Michigan, in Liber 56 of deeds, page 616, was and is in truth and in fact a deed executed in the nature of security and as a mortgage, and was and is in truth and

in fact a mortgage given in cancellation and discharge of the two previous mortgages theretofore by your plaintiffs and said defendants Smyl executed unto said defendant, the former under date of October 22nd, A. D., 1923, and the latter under date of November 22nd, A. D., 1934, and recorded in the office of the Register of Deeds of Arenac County, Michigan, respectively in Liber 35 of Mortgages page 452, and Liber 35 of Mortgages, page 470, and that this Court further decree that all clouds upon the title of said premises by reason thereof be forthwith discharged and removed from record."

(d) "That this Court decree that the so-called land contract, Exhibit A, attached to this bill of complaint herein now filed, and made to form a part hereof, was executed merely as represented evidence of the state of account between your plaintiffs and said defendants Harvey A. Chamberlain, J. O. Mutch, John Doe, Richard Roe, Jane Doe and Mary Roe, as co-partners doing business as the Sterling Bank of Sterling, Michigan, also known as the Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank, and defendant J. O. Mutch, as cashier of said bank, or either of them, and is void and of no force and effect."

(e) Accounting.

(f) For discharge of liability and for payment of moneys.

(g) "That each and every cloud upon the title to the premises in this cause involved, by reason of the conveyances now of record, or not of record, be decreed removed therefrom, and that this Court decree that your plaintiffs herein be the owners of the fee of the premises in this cause involved, free, clear and discharged of all obligations unto said defendants Harvey A. Chamberlain, J. O. Mutch, John Doe, and Richard Roe, Jane Doe and Mary Roe, whether individually or as co-partners doing business as the Sterling Bank of Sterling, Michigan, also known as the Sterling Bank of Sleeper and Chamberlain, also known as the Sterling Bank, and defendant J. O. Mutch, both in his individual capacity and as cashier of said bank."

(h) General relief.

On October 3, 1938, answer and cross-bill was filed in this cause by defendants Mutch and Chamberlain, at that time cashier and owner respectively of the bank in question (45) and in which answer the claim of mortgage obligation as asserted by the plaintiffs was admitted, these defendants through cross-bill, and under claim that the mortgage obligation was in default, seeking a statutory foreclosure of same.

The relief as prayed for in the cross-bill of complaiint in preceding paragraph referred to was as follows (69)):

(1) For accounting under mortgage obligation.

(2) For payment of moneys found due on accounting.

(3) "And in default thereof, that the cross-defendamts herein named, and each of them, and all persons claiming or to claim from or under them, may be foreclosed and barred of and from all equity of redemption and claim of, in and to said mortgaged premises, and every part and parcel thereof, with the appurtenances, except that part which was conveyed to Stanley and Paulina Neidowicki as aforesaid."

(4) "And that all and singular the said mortgagged premises, with the appurtenances, may be sold by the order and decree and under the direction of this Court, and the moneys arising from the sale thereof, so far as shall be necessary, or so far as the same shall extend, be applied toward satisfying the cross-plaintiff, Harvey A. Chamberlain, the full amount of the moneys so as aforesaid secured in and by the said indentures of mortgage and deed operating as a mortgage, both principal and interest, if the whole shall then be due and unpaid."

(5) "And that the said cross-defendants and all persons claiming and to claim under them or either of them, or who have come into possession of the said mortgaged premises, or any part or portion thereof during the pendency of this suit, deliver and yield up possession thereof to cross-plaintiff, Harvey A. Chamberlain, or to whomsoever shall become the purchaser or purchasers thereof at the said sale, on his, her or their producing to him or them, or to the person or persons in possession of the said mortgaged premises, or of any part thereof, the deed

or deeds executed by the special commissioner pursuant to such sale as aforesaid, and a certified copy of the order confirming the report of such sale, after such order has become absolute."

(6) For deficiency in event sale price not sufficient.

(7) General relief.

At the time of the institution of the within proceeding, the defendant bank was not in receivership, this receivership however, having resulted in October, 1938, one Joseph Martin, the present receiver, having been appointed temporary receiver thereafter and he upon petition and consent of counsel having been intervened in said cause by order of the trial court under date of November 7, 1938, he on that same day having filed in this cause regular acceptance of the answer and cross bill filed herein by the defendants Mutch and Chamberlain (88).

On June 14, 1939, this cause came on for trial and disposition before the Honorable John C. Shaffer, Circuit Judge, proofs having been adduced under dates of June 14, 15 and 16, 1939, with suspension of proofs on this latter date due to the death of defendant Chamberlain (see calendar entries R. 1).

Following interruption of proofs as in preceding paragraph stated, informal check up of the books of the bank was undertaken on behalf of the plaintiffs with the result that an indebtedness to the bank owing by themselves and defendants Smyl in the sum of $3,000 was disclosed, a cancellation of this liability together with the payment of the sum of $300 constituting the consideration for which stipulation and decree settling the controversy in question was filed in this cause under date of January 27, 1940 (97, 100).

Notwithstanding the fact that neither the plaintiffs in their bill of complaint nor the defendant-receiver under cross bill sought or prayed that title in fee to the premises in this cause involved be decreed in the defendant-receiver, and notwithstanding the fact that no claim in the testimony on the trial of this cause adduced asserted ownership in fee to the premises involved in the respondent-receiver (R. Ex. 310-504), yet the trial court upon stipulation of counsel made such finding under decree in pre-

ceding paragraph referred to and which provision in this regard as found in said decree reads as follows (100):

"The court being fully advised as to said settlement, and after consideration of the testimony in said cause, IT IS ORDERED, ADJUDGED AND DECREED that said H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain, shall pay to Tony Tudryck and Mary Tudryck, his wife, the sum of Three Hundred Dollars, that thereupon said Tony Tudryck and Mary Tudryck, his wife, shall by good and sufficient conveyance executed by them as grantors, and said H. L. Switzer, Receiver as aforesaid, as grantee, convey all their right, title and interest in and to those certain pieces and parcels of land situated in the Township of Deep River, County of Arenac, State of Michigan, known and described as follows, to-wit:

> The West Half of the East Half of the North East Quarter and the East Half of the West Half of the North East Quarter and the West Half of the East Half of the South East Quarter and the East twenty acres of the West Half of the South East Quarter, all in Section number Eight, Township number Nineteen North of Range Four East

Which said conveyance shall include transfer of all equity of redemption from interest in mortgaged premises and interest in premises being purchased under land contract by said Tony Tudryck and Mary Tudryck referred to in the pleadings filed in this cause, and that said conveyance shall include transfer of all hereditaments and appurtenances on the surface of said land and premises and any mineral and other rights incident to said land under the surface, and any interest in oil and gas or leases covering said premises, or any part thereof, now held by said Tony Tudryck and Mary Tudryck, his wife, or parties claiming by virtue of transfer or assignment from them.

"IT IS FURTHER ORDERED that said deed shall be delivered to said H. L. Switzer, Receiver as aforesaid, upon payment of the sum of Three Hundred Dollars, and that said receiver upon entry of this decree, shall become immediately seized of said premises and have immediate possession of the same, free and clear of any claim or interest of said Tony Tudryck and Mary Tudryck, husband and wife.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon payment of said sum of Three Hundred Dollars as above provided, that said premises shall thereupon be held in fee simple by said H. L. Switzer, Receiver of said Sterling Bank of Sleeper and Chamberlain, free and clear of any claim or interest therein on the part of said plaintiffs or on the part of said J. O. Mutch, or Harvey A. Chamberlain."

On October 31, 1944, plaintiffs filed in the court below their verified petition for the setting aside and vacating of the decree in preceding paragraph referred to, the principal reason, among others assigned, being that there had in this case been want of due process in violation of the Fourteenth Amendment of the Constitution of the United States of America, in that the court had under the decree as entered granted relief not in said proceedings sought and to one not a proper party to the action (125).

On June 30, 1945, following argument of motion to vacate decree as in preceding paragraph explained, and submission of briefs by all counsel in connection therewith, opinion was filed by the trial court denying said petition to vacate (207) an order in pursuance thereof having been signed, filed and entered in said cause some ten months later, and under date of April 23, 1946 (219), the opinion as filed without application therefore on behalf of the respondents intervening as party defendant in the place of Joseph Martin, temporary receiver, one H. L. Switzer as permanent receiver (208), an order of such intervention also having been signed, filed and entered in this cause by the trial court under date of April 23, 1946 (221).

On May 31, 1946, petition was filed on behalf of the plaintiffs to vacate and strike the order of intervention

as in preceding paragraph referred to (227), this petition, however, having been heard and denied by the trial court with order filed in connection therewith on July 8, 1946 (250).

Claiming themselves to be aggrieved by the order of the trial court in having denied their petition to vacate decree and order intervening permanent receiver as in previous paragraphs described, application in accord with the court rule and statute for leave to appeal in the nature of mandamus was filed in the Supreme Court of the State of Michigan (R. Vol. I, 271) such application having subsequently been granted (R. Vol. I, 271) with the result that said cause was regularly docketed and regularly heard as a fully contested matter before the Supreme Court of the State of Michigan under date of October 14, 1947, with decision rendered by the Supreme Court of the State of Michigan affirming the decision of the court below under date of January 6, 1948, (R. Vol. I, 275), this cause now being fully reported in Volume 320, Michigan Reports, page 99, and to which reference is here prayed.

In opinion filed by the Supreme Court of the State of Michigan it was held that no constitutional question was involved (R. Vol. I, 281), all of which finding, however, in opinion of your petitioners was contrary to law and fact in that the due process provision of the Fourteenth Amendment of the Constitution of the United States of America was abridged through the courts having declared title in fee in the premises in said cause involved in the bank receiver, notwithstanding that nowhere within said proceeding was any such claim for and on behalf of the bank receiver asserted, and not withstanding the fact that so far as the bank and its receiver be concerned, the only relief by them or either of them in said proceeding sought was the statutory foreclosure of the obligation admitted to be a mortgage obligation (45).

The actual amount involved in the within controversy is in excess of the sum of $100,000 (132) there already at the time of the original hearing of the petition in the court below being in excess of the sum of $40,000 in cash as oil royalties for the pumping of oil on the land in question

in the hands of the bank receiver, and which said lands in this cause involved so containing said oil was under the decree herein now sought to be vacated, granted unto the respondent receiver herein, in consideration of cancellation of the $3000 liability and the payment of $300 in cash and which latter $300 was heretofore tendered in return to the bank receiver and refused (200), the entire transaction thus involved being a grossly unconscionable one well within the meaning of the Fourteenth Amendment of the Constitution of the United States of America through depriving the petitioners of property without due process.

III.

QUESTIONS PRESENTED

The questions presented by the petition for writ of certiorari based upon the pleadings and proofs filed and adduced before the Trial Court, the decree upon stipulation as by that Court entered, the application for leave to appeal to the Supreme Court of the State of Michigan, and the reasons and grounds for such appeal as to that court presented are as follows:

Was and is not the decree as entered in the court below, vesting title in fee simple to the premises in said cause involved in the bank receiver, notwithstanding that no such relief was any where within the proceedings involved sought, and notwithstanding the fact that the relief granted was to one not a party to the suit, void

(a) Because it deprived the petitioners herein of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States of America, and

(b) Because it denied to petitioner the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

Every question arising under the Constitution may, if properly raised in a state Court come ultimately to this court for decision:

Hague vs. C. I. O., 59 S. Ct. 954 307 U. S. 496 83 L. Ed. 1423.

IV.

STATEMENT OF JURISDICTION

Petitioners claim that this court has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan to review its affirmance on January 6, 1948, of the order of the trial court, under the provisions of the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936, as amended, Section 237(b) thereof, which provides as follows:

> "Sec. 237(b). It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination, with the same power and with like effect as if brought up by writ of error, any cause wherein *a final judgment or decree* has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any *title, right, privilege or immunity* is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States and the power to review under this paragraph may be exercised as well where the Federal Claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

V.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT OF CERTIORARI

We rely upon the following reasons as to why this Court should issue its Writ of Certiorari:

(a) Because a State Court has decided a Federal question in a way probably not in accord with applicable decisions of this Court.

(b) Because the Supreme Court of the State of Michigan did through the entry of opinion as in this cause filed, neglect, fail and refuse to find that a Constitutional question was involved.

(c) Because the conclusion of the Supreme Court of the State of Michigan that no Constitutional question was involved was erroneous and contrary to the heretofore announced decisions of this Court in like cases made and provided.

(d) Because this question of want of due process in violation of the Fourteenth Amendment of the Constitution of the United States of America on occasions similar to the case here at bar has heretofore many times been determined by this Court which has repeatedly held that there is such a violation of such Constitutional provision when the relief in proceedings granted be outside of the purview of the relief sought.

(e) Because in affirming the order of the lower court denying unto petitioners vacation of decree as in said proceeding signed, filed and entered, the Supreme Court of the State of Michigan permitted the respondent receiver herein, not a party to this suit, to acquire title in fee simple to the premises in this cause involved without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States of America.

(f) Because in affirming the order of the lower court denying unto petitioners vacation of decree as in said proceeding signed, filed and entered, the Supreme Court of the State of Michigan permitted the respondent receiver herein to acquire title in fee simple to the premises

in this cause involved and did thereby deny unto the petitioners herein the equal protection of the law as guaranteed unto them by the Fourteenth Amendment of the Constitution of the United States of America.

(g) Because the action of the Supreme Court of the State of Michigan in affirming the refusal of the lower court to vacate the decree herein by the petitioners sought was such and is such as to permit the respondent bank receiver to acquire the valuable oil premises in the cause involved and worth hundreds of thousands of dollars for the sum of $300 heretofore tendered in return to the respondent receiver herein and by him refused (200), certainly most inequitable and unconscionable and in violation of the equal protection of the law and due process provisions of the Fourteenth Amendment of the Constitution of the United States of America.

VI.

ARGUMENT

A. The Decree as Entered in the Court Below Void, Same Being in Violation of the Fourteenth Amendment of the Constitution of the United States of America Both as to Want of Due Process and Equal Protection of the Law.

The Fourteenth Amendment among other things provides as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In opinion in this cause filed by the Supreme Court of the State of Michigan sustaining the action of the lower court in its denial of petition to vacate the decree now before this Court for consideration, decision was based largely upon the proposition that the decree as entered based upon stipulation of counsel was a consent decree

which could not be vacated without the consent of the parties, the Court also having found that H. L. Switzer, permanent receiver in whom title in fee in the premises here involved did under this decree vest, was a proper party to this proceeding and that no constitutional question was involved (R. Vol. I, 281). In all of these conclusions error is claimed, each reason assigned reverting to the principal question involved, namely, the effectiveness of this decree under the Fourteenth Amendment to the Constitution of the United States of America as above quoted, and which, if effective as contended by the petitioners, would avoid this decree even though consented to, for under the decisions as hereinafter cited, a void decree is no decree at all.

Thus it can be seen that the questions of "want of due process" and "equal protection of the laws" are the most important things in the case at bar and of which the Supreme Court of the State of Michigan entirely lost sight.

(a) ***The Court without jurisdiction due to want of due process.***

The legal question to be considered under the above caption is perhaps the most important question in the consideration of this matter now before the Court. In passing upon same it is very necessary that this Court have special reference to the Bill of Complaint (4) and the Answer and Cross-Bill to that Bill of Complaint (45) by the defendant-bank subsequently accepted as his own by the defendant temporary-receiver (88) and the transcript of testimony adduced on trial in Cause No. 856 (Ex. 2, R. 310-505) in order to ascertain as to whether or not there was any such accounting in this proceeding as to afford of the relief given to the permanent receiver under the decree herein. And this we emphasize and especially direct to this Court's attention for the reason that in the opinion filed by the Trial Court and Supreme Court of the State of Michigan justification for the entry of this decree is found through making it appear that the suit by the plaintiffs was in effect an accounting suit under which such relief could be granted. That same was

not an accounting suit and that the accounting was merely incidental thereto to determine as to whether or not the mortgage obligation as claimed by the plaintiffs and subsequently by the defendants in their Answer and Cross-Bill admitted, had been discharged; the main purpose of the suit brought by the plaintiffs being to have established as mortgages the deed and the land contract under which this bank was asserting ownership of the fee and the foreclosure of this mortgage obligation in accord with the statute in such case made and provided under the Cross-Bill of the defendants and subsequently assumed as his own by the temporary receiver.

To sustain the decree as entered, not only is it claimed that same was within the relief sought by the plaintiffs in their Bill herein filed but further assert in addition thereto that decree may not now here be attacked because it is a consent decree based upon written stipulation of counsel and that moreover these plaintiffs are barred from such relief because of laches and estoppel.

(b) ***What is due process.***

In

Scott vs. McNeal, 154 U. S. 34

the court said (p. 46):

> "No judgment of a Court is due process of law if rendered without jurisdiction in the Court, or without notice to the party.
>
> "The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court (in Pennoyer v. Neff, 95 U. S. 714, 733) means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

In

15 *R. C. L.* 841, Sec. 316, Judgments

we find the following:

> "In every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and it is a fundamental rule that a judgment or decree which the court has no jurisdiction to pronounce is void. It is, in legal effect, no judgment, and has no force either by way of evidence or estoppel, but leaves the parties litigant in the same position they were in before the trial. Unless jurisdiction exist, the judgment is not due process of law, and is ineffectual for any purpose."

(c) ***To constitute due process, relief granted must be in accord with the relief sought.***

In

10 *R. C. L.* 555, Equity, Sec. 338

it is said:

> "The relief granted must always be in conformity with the case made in the pleadings and established by the proof, and relief cannot be granted that is at variance with either."

In

15 *R. C. L.* 604, Judgments, Sec. 43

it is said:

> "In order to give a judgment the merit and finality of an adjudication between the parties, it must be responsive not only to the proofs but to the issues tendered by the pleadings, because pleadings are the very foundation of judgments and decrees."

The rules above captioned find ample support both in cases heretofore decided by the Supreme Court of the United States as well as by the Supreme Court of the State of Michigan, the rule being almost a universal one throughout the courts of the land.

Among the United States cases, the one most leading is that of the case of

Reynolds vs. Stockton, 140 U. S. 254

This case involved a suit in New Jersey on a judgment rendered by a New York court. The New Jersey court of appeals held the judgment void. The Supreme Court of the United States affirmed this decision stating its reasons as follows:

> "We are of the opinion that the decision of the Chancery Court of New Jersey, as sustained by the court of errors and appeals of that state, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York *was not responsive to the issues presented.* The section of the Federal Constitution which is involved by plaintiffs, is Section 1 of Article IV, which provides that "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state'. Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other state in and of themselves require. It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, *but which is in no way responsive to the issues tendered by the pleadings* and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. The requirements of that section are fulfilled when a judgment rendered in a court of one state which has jurisdiction of the subject matter and of the person, and which is substantially responsive to the issues tendered by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state. The scope of this constitutional provision has often been presented to and

considered by this court, although the precise question here presented has not as yet received its attention. * * * If the fact of a judgment rendered in a court of one state does not preclude inquiry in the courts of another as to the jurisdiction of the court rendering the judgment over the person or the subject matter, it certainly does not preclude inquiry as to whether the judgment so rendered *was so far responsive to the issues tendered by the pleadings* as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case: Given a court of general jurisdiction, over actions in ejectments as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same state. If not there, the constitutional provision gives no greater force to the same record in another state.

"We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained although personal service was made upon the defendant. *The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings.* This idea underlies all litigation. Its emphatic language is, that a *judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted.*

" * * * In the opinion of the court of errors and appeals, the case of Munday vs. Vail, 34 New Jersey

Law 418 is cited. In that case the proposition sttated in the syllabus, and which is fully sustained byy the opinion, is that 'A decree in equity if entirely aaside of the issues raised in the record, is invalid andl will be treated as a nullity even in a collateral prooceeding.' We quote from the opinion: 'The inquirry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudlicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of casees to which the one to be adjudged belongs; second, the proper parties must be present; and third, the ppoint decided must be, in substance and effect, withinn the issue. That a court can not go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are prroppositions established by a multitude of authoritiess. A defect in a judgment arising from the fact thatt the matter decided was not embraced within the iissue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and BB are parties to a suit, a court can decide any matteer in which they are interested, whether such matter bbe involved in the pending litigation or not. Personas becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests, which they choosse to draw in question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogetheer arbitrary and unjust, as it concludes a point upon wwhich the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that thee law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are noot estoppels with reference to every matter containeed in them. They have such efficacy only with respect to

the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Lit. 352 b. And in a note to the Duchess of Kingston's case, in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments 'are conclusive as to nothing, which might not have been in question, or were not material.' For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale. Giffard v. Hort. 1 Sch. & Lef. 386, 408. See also Gore v. Stacpoole, 1 Dow, 18, 30; Colclough v. Sterum, 3 Bligh, 181, 186.' Reference is made in the opinion to the case of Corwithe v. Griffing, 21 Barb. 9, in respect to which the court said: "Commissioners in partition, in their distribution embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, 'as the jurisdiction was confined to the subject matter set forth and described in the petition.' In this case the court had jurisdiction in cases of partition and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented." The case is very much in point. We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit inter partes. See, also, Unfried v. Heberer, 63 Indiana 67 * * * But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties must, *with the limitations heretofore stated, be responsive to the issues tendered by the pleadings.* In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is

made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another state."

In

Standard Oil Company vs. Missouri, 224 U. S. 270

an appeal from a Missouri judgment in a quo warranto proceeding, Justice Lamar says (page 280):

"It is, of course, essential to the validity of any judgment that the court rendering it should have jurisdiction not only of the parties, but of the subject matter, Chicago B. & C. Railway vs. Chicago, 166 U. S. 226, 234, 247 * * *

"The federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and hearing should correspond, and that the *relief granted should be appropriate to that which had been heard and determined on such notice.* For even if a court has original general jurisdiction, criminal and civil, at law and in equity, *it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.*

"Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in the modes of procedure, and the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in

the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of the contract. If the action be for the possession of property, the court is powerless to admit in the case the probate of a will * * * *The judgments mentioned, given in the cases supposed, would not be merely erroneous: They would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases'*, Windsor vs. McVeigh, 93 U. S. 274, 282."

In

Radford vs. Myers, 231 U. S. 725,

the court says (p. 733):

"Judgments become estoppels because they affect matters upon which the parties have been heard, or have had an opportunity to be heard, but *are not conclusive upon matters not in question or immaterial.* Reynolds vs. Stockton, 140 U. S. 254, 268, 269."

Coe vs. Armour, 273 U. S 413,

was an appeal from a Florida judgment against a stockholder of a corporation rendered under a state statute. The Court says (p. 424):

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees vs. Watertown, 19 Wall 107, 123.

"Nor can extra-official or casual notice or a hearing granted as a matter of favor or discretion be deemed a substantial substitute for the due process of law that the constitution requires. In Stuart vs. Palmer, 74 New York, 183, 188, which involved the expense of a local improvement upon the lands benefited, but without notice to the owner the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a

hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

In

Snyder vs. Massachusetts, 291 U. S. 97, 78 L. Ed. 674

defendant, on trial for murder, requested permission to accompany the jury when they visited the scene of the crime. The trial judge denied permission and an exception to the ruling was taken. The defendant was convicted, and the conviction was affirmed in the Supreme Court of Massachusetts, and Certiorari to the United States Supreme Court affirmed. Mr. Justice Roberts, dissenting, said (128):

"To conform to modern conditions they (the States) may substitute a new form of procedure for one long practiced and recognized. But, whatever the form or method of procedure adopted, they remain always subject to the prohibition against that which is commonly thought essentially unfair to him who is to be afforded a hearing. *Tested by this principle, the trial of an issue beyond the claim asserted • • • has been adjudged to deny due process.*"

THE MICHIGAN LAW

And it is likewise the law of the State of Michigan that a court of equity has no inherent power to grant any relief it sees fit just because it has before it the subject of the controversy and certain parties interested therein.

That such is the law in Michigan finds support in the case of *Maslen vs. Anderson,* 163 Mich. 477, where the Court said (483):

"It is impossible to concede that because A and B are parties to a suit that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves *for all*

purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. If, in any ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the *point decided was not within the substance of the pending litigation.* In such a case the court would have acted within the field of its authority, and the proper parties would have been present; *the single but vital flaw having been the absence from the record of any issue on the point determined.* The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice."

In

Electrotype Co. vs. Powers-Tyson Co., 245 Mich. 669,

the court said, on page 671:

"A court is something more than an arbitrator chosen by agreement of the parties. It can act judicially only when it has jurisdiction of the subject matter of the controversy; otherwise it acts prejudicially. Jurisdiction of the subject matter cannot be given by consent, especially where the law has withheld it."

In

Warner vs. Noble, 286 Mich. 654

a bill was filed to determine the location of a boundary line and for an injunction. Here the defendants and the plaintiffs were owners of adjoining lots, the defendants having a fence upon plaintiff's lot and asserting ownership of that lot within that fence.

The bill of complaint asserted full ownership of this entire lot in the plaintiff, and the defendant in answer

waived all technicalities and requested decree upon the merits.

In the lower court plaintiff prevailed, he obtaining decree of full ownership in the entire lot and the defendants being enjoined as prayed for. On appeal, however, the case was reversed and dismissed, inasmuch as the matter of the boundary line was the only issue involved, a matter cognizable in ejectment proceedings and the lower court having been without jurisdiction to determine ownership of the lands, that not being prayed for.

In this case, the court said, on pages 659, 660:

> "Under the facts as disclosed by the testimony, equity has no jurisdiction and the bill of complaint should be dismissed. Jurisdiction of the subject matter cannot be given by consent * * *. The question of jurisdiction may be raised at any time, * * * and if want of jurisdiction appears, this court is bound to recognize it."

In

In Re Estate of Fraser, 288 Mich. 392

the court said (394):

> "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceedings. * * * Jurisdiction cannot rest upon waiver or consent."

In

Township of Warren vs. Raymond, 291 Mich. 426

a Bill was filed to enjoin defendants' operation of an auto junk yard in violation of a township ordinance.

The Bill made no claim that this business was a public nuisance and sought no relief on that ground, the decree being based thereon.

In reversing decree in favor of plaintiffs as entered in the court below the court said on pages 428, 429:

> "The business of wrecking automobiles and of salvaging parts is not a public or private nuisance per se. * * * In this case the pleadings do not allege a public nuisance calling for injunctive relief. In the absence of such an issue the equity court is without jurisdiction to enforce the ordinance by injunction. The question of lack of jurisdiction is open on appeal notwithstanding it was not raised in the trial court."

In

Lehman vs. Lehman, 312 Mich. 102

decree of divorce was granted to plaintiff husband in the Chippewa Circuit where the bill had been filed with answer and cross-bill filed on behalf of defendant wife.

At the time of the proceedings neither party was a resident of Chippewa County, no question of jurisdiction however having been raised in the court below.

On appeal the decree was vacated and the bill dismissed, the court saying, page 105:

> "The question of jurisdiction was not raised in the trial court, but it is raised and should be determined on this appeal."

and on page 106:

> "The jurisdiction of the court was statutory, * * * and jurisdiction could not be conferred by consent of the parties."

And not only does the court of equity not possess inherent power to grant any relief it sees fit regardless of the relief prayed for, but it is the law of the State of Michigan that the only relief that can be granted by a court of equity in a mortgage foreclosure suit is that of mortgage foreclosure.

Foreclosure of mortgages in the State of Michigan is strictly statutory and these statutes must be and are

strictly construed and that the equity court does not possess inherent power in a foreclosure suit to grant relief other than that applicable to foreclosures is plainly apparent from the following authority:

In

Wurzer vs. Geraldine, 268 Mich. 286

the court said (288):

> "Mortgage foreclosure proceedings are special and statutory and not an exercise of inherent equity powers of the court. Johnson vs. Shepard, 35 Mich. 115; Kelly vs. Gaukler, 184 Mich. 159; Collen vs. Sooy, 172 Mich. 214; Union Trust Co. vs. Detroit Trust Co., 243 Mich. 451; Janower vs. F. M. Sibley Lumber Co., 245 Mich. 571."

(d) ***To constitute due process the court among other things must have jurisdiction of the person.***

The stipulation and decree filed and entered in this cause on the 27th of January, 1940 (97) directed that the ownership of the fee of the premises in question be in H. L. Switzer, permanent receiver, and directing, among other things, that the plaintiffs convey their interest in said premises by quit claim deed to H. L. Switzer, permanent receiver; such deed having in accord therewith been delivered.

At the time of the filing and entry of such stipulation and decree, H. L. Switzer was the permanent receiver of the defendant bank and while attorneys Yeo & Bilitzke had under proper order been named as his counsel in the Receivership Cause No. 861, Chancery Division of the Circuit Court for the County of Arenac, Michigan, nevertheless, no proceedings had at any time been taken, either in that receivership cause No. 861 or in this present cause to in any manner bring this permanent receiver, H. L. Switzer, into this case as party defendant. At no time was the Court, in charge of the Receivership proceedings of the Cause No. 861, asked to permit this permanent receiver to become substituted in the place and stead of the tem-

porary receiver, Joseph Martin, who had appeared and pleaded in this Cause (88) nor was any petition ever, at any time, filed, or any proceeding at any time had in this cause to in any manner bring this permanent receiver, H. L. Switzer into this present case as a party defendant.

So far as the records and files of the Chancery Court of Arenac County stood at the time of the entry of the final decree herein, on January 27, 1940, there was nothing in any case to authorize or permit or make H. L. Switzer, the permanent receiver, the proper party-defendant to this cause and while it was true that at the time of the entry of this final decree Joseph Martin was no longer the temporary receiver of this bank, having been succeeded by H. L. Switzer on December 16, 1938 (221), yet nevertheless, he Joseph Martin, was still in this cause No. 856 as a party-defendant and was never, prior to April 23, 1946, when the nunc pro tunc order was entered (221), in any manner substituted in this cause by anyone else.

Under the law, as we find it, the Receiver is not bound to take over litigation; the law vests him with discretion and it is up to such Receiver to determine as to whether or not there be merit in the controversy; as to whether or not there be possibility of success and as to whether or not there be risk of incurring obligation. If, with knowledge of such suit, the Receiver does not see fit to take over the litigation and become substituted therein then the law assumes that in the exercise of his discretion and judgment he does not consider the suit worth while.

The necessity and the effect of a Receiver participating in pending litigation finds support in the following:

Clark on Receivers, (2) Sec. 610, 616;
Beach on Receivers, Sec. 708;
Alderson on Receivers, Sec. 578;
High on Receivers, Sec. 258;
11 *U. S. C. A.* Sec. 29;
8 *C. J. S.* Sec. 212, pp. 693-695;
Wilson vs. Farmers' Mut. Fire Ins. Co., 184 Mich. 530, 533;
Bennett vs. Associated Theatres, 247 Mich. 493.

If H. L. Switzer, the permanent receiver, was not a proper party to this proceeding, then the entire Decree granting him relief herein is of no more force and effect than if entered in favor of John Doe, or any person sitting in the court room. If this be true, the Court was wholly without jurisdiction in the premises, for if the Court had no jurisdiction, the Decree was void from its inception, and stands here without force or effect and legally, as if no Decree whatever had been entered.

In apparent recognition of the fact that the Decree, as herein entered, granted relief unto H. L. Switzer, permanent receiver not a proper party in this case, the trial court in effort to overcome this legal obstacle directed in his opinion, filed on the 30th day of June, 1945 (207) in connection with this present proceeding, that an Order be entered substituting and intervening H. L. Switzer, permanent receiver, nunc pro tunc as of December 16, 1938; an Order for such substitution and such intervention having been signed and filed herein on April 23, 1946 nunc pro tunc as of December 16, 1938 (221).

On April 23, 1946, H. L. Switzer was no longer the permanent receiver of this bank, he having resigned in December of 1942 (See Calendar Entries Receivership Cause No. 861 (R. Ex. 533) so that here we are faced with the situation where the trial court without any prior proceedings or requests therefor by the present permanent receiver of the defendant bank or anyone else did enter an order under date of April 23, 1946, and filed nunc pro tunc as of December 16, 1938, (an elapse of seven (7) years and four (4) months) substituting and intervening H. L. Switzer permanent receiver as party defendant in the place and stead of Joseph Martin, temporary receiver.

As in the case of mortgage foreclosures, intervention was not permitted at common law but is solely a creature of statute which must be strictly followed and strictly construed. This statute is Section 14019 of the 1929 Compiled Laws of the State of Michigan, (Sec. 27.663, *Mich. Stat. Ann.*) reading as follows:

> "In an action either at law or in equity, anyone claiming an interest in the litigation may, at any

time be permitted to assert his right by intervention but the intervention shall be in subordination to and in recognition of the propriety of the main proceeding; provided, that in attachment actions any party other than the original defendant claiming to own any of the property attached, may assert his rights by motion to release the attachment, so far as it effects his property, which motion shall be heard and determined by the court under the same terms and conditions as motions in other cases."

And that such failure to intervene cannot be cured by reason of the order entered on April 23, 1946 and filed nunc pro tunc as of December 16, 1938, finds full support in the following:

In

Curtis vs. Curtis, 250 Mich. 105

plaintiff husband under date of October 2, 1927, instituted suit for divorce against his wife, who though subsequently served with process, did not appear, her default having been entered and a decree of divorce in favor of the husband having been entered upon the 26th of January, 1928. On September 7, 1929, defendant wife, claiming that she was a minor at the time of the suit for divorce and decree, filed a petition asking its vacation, she also representing among other things that her failure to defend was because of certain fraudulent representations and promises made to her by her husband. In answer to the wife's petition to vacate the decree, the husband filed petitions denying all allegations of fraud, asserting his belief that his wife was of age at the time of these proceedings, but praying among other things, that to cure any possible error, the court appoint a guardian ad litem nunc pro tunc as of the time of the filing of the bill.

At the time of the proceedings to vacate decree as above stated, the husband had remarried, the trial court having granted the husband's petition and having entered an order nunc pro tunc as of the time of the filing of the bill, the former wife's petition to vacate being denied.

Upon appeal from such denial, a reversal was had, the court among other things having said (107):

> "The order appointing a guardian ad litem after decree, was a nullity. The appointment served no purpose and besides cannot be entered nunc pro tunc.
>
> "In Freeman v. Wayne Probate Judge, 230 Mich. 455, we pointed out the office of a nunc pro tunc order and stated that it is permitted to perfect a record of judicial action taken, *but not to supply some judicial action omitted.*"

In

Mallory vs. Ward Baking Company, 270 Mich. 91

the wife filed a petition asking compensation on account of the death of her husband, an award granting her 300 weeks compensation having been entered on June 19, 1928.

On June 13, 1931, compensation upon petition of defendant was stopped, inasmuch as the wife had remarried. At the time of the death of the husband, he left him surviving, a wife and a daughter, the plaintiff in this action. Nothing however appeared in the record as to the daughter and no award of compensation in her behalf having been entered, she however after her mother's marriage having instituted the present proceeding and all resulting in an order nunc pro tunc having been entered by the Department of Labor and Industry, granting unto her the right to compensation as a dependent child and all effective from the time of the filing of the proceeding by her mother.

On appeal to the Michigan Supreme Court, this award was vacated, the court having said (93):

> "The next question involves the right of the Department of Labor and Industry to amend an order made in 1928 or nearly five years after it was made. The record discloses that no compensation could be

awarded for the girl on the evidence taken in 1928, as there was no showing made that she was a dependent of Ben Clark.

"In Perkins v. Hayward, 132 Ind. 95, 101, the court said:

"'A nunc pro tunc entry in practice is an entry made now of something that was actually previously done, to have effect as of the former date. *Its office is not to* supply omitted action by the court, but to supply an omission in the record of action really had but omitted through inadvertence or mistake.'

"We accept this language as stating the uses and purposes of a nunc pro tunc order. In Freeman vs. Wayne Probate Judge, 230 Mich. 455, the action of the department was not supplying an omission in the record, but creating a new record without supporting testimony. This it may not do.

"The award is vacated with costs to appellant."

B. Jurisdiction May Not Be Conferred by Consent.

That the rule above captioned is the rule prevailing in the United States Supreme Court finds support in the following:

Kelsey vs. Forsyth, 62 U. S. 85;
Ballance vs. Forsyth, 62 U. S. 389;
The Schooner Lucy vs. U. S., 75 U. S. 307;
Town of Elgin vs. Marshall, 106 U. S. 578;
Re Frank D. Winn vs. U. S., 213 U. S. 458;
Re 433 Cans of Frozen Egg Products, H. J. Keith Co., claimant vs. U. S., 226 U. S. 172;
Swift & Co. vs. Hocking Valley R. Co., 243 U. S. 281;
Stratton vs. St. L. & S. W. R., 282 U. S. 18.

In

U. S. vs. Corrick, 298 U. S. 438

in passing upon the question of conferring jurisdiction by waiver or consent the court said (440):

"And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it."

In

Clark vs. Paul Gray, 306 U. S. 583

where consent to jurisdiction as to amount was not raised in the court below, the Supreme Court on appeal itself considered same, and in reversing the lower court said (588):

"But on the argument, it appearing doubtful whether the 'matter in controversy' exceeded 'the sum or value of' $3000, Sec. 24 (1) of the Judicial Code, 28 U.S.C.A. Sec. 41 (1) we raised the question whether the jurisdictional amount was involved, as was our duty."

In

14 *Am. Jur.* Courts, 184

it is said:

"It is a universal rule of law that parties cannot, by consent, give a court jurisdiction of a subject matter of which it would not otherwise have jurisdiction, and a judgment rendered in such a case is not validated by the consent. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver or estoppel."

In considering this question of one of jurisdiction because of failure of due process certain things must be borne in mind:

First, this suit was instituted in the Circuit Court for the County of Arenac, Michigan, for the sole purpose of having a certain deed and a certain land contract held between the petitioners Tudryck and the bank construed as a mortgage; second, that in answer and cross-bill filed in this proceeding by this bank, the nature of the deed

and land contract as a mortgage was by the bank admitted, the bank under a cross-bill in this proceeding filed, in its behalf, having asked for the foreclosure of that mortgage security; third, that no process on the cross-bill was ever issued out of the court below or served upon the defendants Smyl nor were they ever in any way at any time brought into this proceeding as such cross-defendants; fourth, that there was no adjudication on the merits of the controversy in this cause, the plaintiffs in no manner having completed their proofs at the time of the necessary interruption of same during cross examination of adverse witness Mutch because of the death of Mr. Chamberlain (310-505); fifth, the execution of a stipulation by Harry J. Lippman as attorney for the plaintiff and by Yeo and Bilitzke, as attorneys for the receiver, finding fee in the premises in the bank with no interest in same in the Tudrycks or the Smyls and providing for settlement of such controversy for the sum of $300 and release of certain Tudryck and Smyl obligations to the bank; sixth, the entry of a decree based upon stipulation under preceding number referred to and which decree did in conformity with such stipulation, find the fee of the premises in the bank, with no interest in same in the Tudrycks or Smyls and directing the payment of the $300 and release of liability as in said stipulation provided; seventh, the giving, execution and delivery of the quitclaim deed by the Tudrycks to H. L. Switzer, permanent receiver of this bank; eighth, the execution of the stipulation by the plaintiffs through their counsel and by Yeo and Bilitzke as attorneys for the permanent receiver, H. L. Switzer, and the subsequent entry of decree and receipt of deed, etc., in consequence thereof, all notwithstanding the fact that at the time of such stipulation and such deed and decree, the said Switzer had not intervened or been substituted in this cause, nor had any proceedings in any way been taken before this court under the intervention statute, Section 14019 of the 1929 Compiled Laws of Michigan to in any manner bring him into that cause as a proper party defendant; ninth, the granting of relief under decree as entered in this cause to the said H. L. Switzer, permanent receiver, an entire stranger to this proceeding; tenth, that a tender of return of all the moneys received

by the Tudrycks and the said Harry J. Lippman in settlement of this cause was heretofore made in open court and refused (188-205).

In arguing the voidness of the stipulation and decree as aforesaid, we do not in any manner charge bad faith to either court or counsel. Frankly, the legal effect of these issues upon this question of void decree because of *"want of due process"* in violation of the constitutional provisions of the Fourteenth Amendment to the Constitution of the United States of America was not even then in mind. Had it been, we are quite sure that the matter would have been handled in accord with the statutory proceedings of mortgage foreclosure in such cases made and provided.

As the matter stands however, there are to our minds, certain fixed and definite rules which now make mandatory the finding in this case that the stipulation and decree divesting the Tudrycks and the Smyls of the property in question with passing of the fee of same to the bank, was wholly without legal force or effect.

The question of want of due process because of failure to have the decree of the court terminating the issues involved in cause No. 856 conform to the pleadings and proofs and the relief asked has already heretofore herein been fully briefed and will not therefore be here repeated.

However, there are certain further cases in control of this situation and arising in Michigan which we believe the court should have here presented.

In the first place, it is a well settled rule of law in the State of Michigan, not susceptible of dispute, that jurisdiction either of the subject matter or the parties may not be conferred by stipulation.

Shane vs. Himelstein, 227 Mich. 465;
Hartz Co. vs. Lukaszcewski, 200 Mich. 230-232;
Anway vs. Railway Co., 211 Mich. 592;
Electrotype vs. Powers Tyson Corp., 245 Mich. 669-671;

Frost vs. Atwood, 73 Mich. 67;
Janower vs. F. M. Sibley Lumber Co., 245 Mich. 571;
Stolte vs. Krentel, 271 Mich. 98;
In Re Estate of Meredith, 275 Mich. 278;

In

Goldberg vs. Elmwood Cemetery, 281 Mich. 647.

a bill for moratorium relief was filed, an order by consent fixing rental in the sum of $60 a month having been entered.

Some two years later, the lower court on proper motion, increased the moratorium payments to $80 a month and the plaintiff claiming that the trial court was without jurisdiction to modify the first order because of it having been consented to, appealed from that order.

In this case the Supreme Court of the State of Michigan said (649):

> "A judgment by consent cannot ordinarily be set aside or vacated by the court without consent of the parties thereto for the reason it is not the judgment of the court but the judgment of the parties. * * * But a consent decree in order to be valid, must come within the jurisdiction of the court and cannot confer jurisdiction where the law confers none * * *."

People vs. Meloche, 186 Mich. 536;
Straus vs. Barbee, 262 Mich. 113;
In re Halke vs. Douglas, 267 Mich. 600;
Wisser vs. Wayne Circuit Judge, 247 Mich. 52.

In the case at bar, it is the plaintiff's claim that the decree entered in the lower court because of want of due process, want of proper party defendant, granting of relief not prayed for, etc. makes that decree in that cause so entered upon the stipulation by counsel, a nullity, it being void.

As has been said by the Michigan Supreme Court many times and oft times repeated in other jurisdictions, a void

decree or a void proceeding is no decree or proceeding at all.

In

Black's (2nd Ed.) Void and Voidable Judgments, Sec. 170

it is said:

> "A void judgment is in reality no judgment at all. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral."

In

Greenvault vs. Farmers and Mechanics Bank, 2 Doug. 498

the Court said (508):

> "Can a party then to such proceedings, come under the statute in the character of a plaintiff, so far as the prosecution of his own claim was concerned, protect himself under a sale made by virtue of an order entered in the records of a court which never acquired jurisdiction of the subject matter, a court within whose jurisdiction the property never was brought? As well it might be contended that a judg-

ment where the proceedings are in personam could be sustained when it affirmatively appears in the record that the person to be affected by the judgment, never was brought within the jurisdiction of the court by whom it was rendered. The distinction is well defined between cases where jurisdiction is acquired and is improvidently exercised and cases where jurisdiction never was acquired. In the first class of cases, the judgments will bind until reversed. In the other, the judgment is a mere nullity; it is as though it had never been entered. In the first class, the record cannot, in general be impeached; in the last, it may be impeached, especially if it shows on its face that jurisdiction was usurped. Acts done by a court without authority are equally as void and for the same reason as acts done without authority by either the executive or legislative departments of the government."

C. The Fourteenth Amendment to the Constitution of the United States of America Requiring Equal Protection of the Law Makes Mandatory Conscionable Transactions.

The considerations involved in the case at bar and in return for which the lands in question were decreed unto the respondent bank receiver, was the sum of $300 in money and the cancellation of a $3,000 liability owing not only by these plaintiffs by themselves, but also by the defendants Smyl (103).

These lands, consisting of one hundred forty acres at the time, were farm lands, oil not having been discovered thereon until some four years thereafter, and all as a result of which these lands are now of considerable value, alleged by the plaintiffs to be in excess of one million dollars, and conceded by the respondent-receiver to be at least the value of $160,000, plus payment of receivership administration costs and attorneys' fees, because we find the bank receiver himself asserting that it is necessary to have these lands in order to pay depositor obligations in the sum of $160,000 or thereabouts (132-142).

A return of the $300 paid by respondent bank receiver to the petitioners herein was by the petitioners tendered and by the receiver refused (200), and as the matter now stands, the bank receiver under decree and quit claim deed holds title in fee simple to 140 acres of perhaps some of the most valuable oil lands in the State of Michigan for a sum which of necessity must shock the conscience of any court.

The Fourteenth Amendment of the Constitution of the United States of America makes mandatory the equal protection of the law to all of the citizens of the United States, and in applying such rule, that no such equal protection may be afforded is apparent if for any reason one may acquire property of another worth millions for the disproportionate sum of $300, that being the situation in this case presented. That such action is not countenanced under the law as interpreted by the Supreme Court of the United States and of the State of Michigan finds support in the following:

> *Jenks vs. Quidnick Co.*, 135 U. S. 457, 34 L. Ed. 200.

In this case a bill in equity was filed to establish title to 4022 shares of capital stock of defendant corporation claimed to have been purchased on execution sale for $275. The stock was valued by a committee of creditors of the embarrassed firm at $374 per share and was at the time worth more than $500,000. In affirming the lower court's dismissal of the bill of complaint, this court said (203):

> "In other words, these complainants are asking the interposition of a court of equity to establish their title to property worth over half a million dollars obtained by purchase at execution sales for $275. The immense disproportion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. Some rights must have suffered and some wrongs must have been done by such a transaction, and a court of equity properly says that it will not lend its aid to further such an unconscionable speculation."

In

Marks vs. Gates, 83 C. C. A. 321, 154 Fed. 481

plaintiff brought suit in chancery for the specific performance of an agreement under which he was to have a one-quarter interest in any property of any kind thereafter to be located or acquired by the defendant in Alaska.

The consideration for the transaction was the payment of $1000 in cash and a cancellation of an $11,225 debt.

Here the defendant subsequent to the making of the agreement in question acquired lands and mining claims in Alaska worth approximately $750,000 and upon his refusal to fulfill his bargain with the plaintiff as to this one-quarter interest, suit for specific performance was brought. In the lower court relief was denied unto the plaintiff on the ground that the contract was an unconscionable one, this same being the opinion on appeal affirming the dismissal of the case in the court below, the court having said:

> "A contract may be valid in law, and not subject to cancelation in equity; and yet the terms thereof, the attendant circumstances, and in some cases the *subsequent events*, may be such as to require the court to deny its specific performance. In Pomeroy on Equity Jurisprudence Vol. 1 sec. 400, it is said 'He who seeks equity must do equity. The doctrine, thus applied, means that the party asking the aid of the court must stand in conscientious relations towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant.
>
> • • •
>
> "But, where the consideration is so grossly inadequate as it is in the present case, *and the contract is made without any knowledge at the time of its making, on the part of either of the parties thereto, of the nature of the property to be affected thereby, or of its value*, no equitable principle is violated if specific performance is denied, and the parties are left to their legal remedies, if any they have."

In this case the court predicated its decision largely upon cases determined before the United States Supreme Court, saying among other things as follows (320, 321):

"Said the Court in *King v. Hamilton*, 4 Pet. 311-328, 7 L. Ed. 869, 875:

"But this power is to be exercised under the sound judicial discretion of the court with an eye to the substantial justice of the case. When a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. Where a contract is hard and destitute of all equity, the court will leave parties to their remedy at law, and, if that has been lost by negligence, they must abide by it. It is a settled rule, therefore, to allow a defendant, in a bill for a specific performance of a contract, to show that it is unreasonable or unconscientious.

"In Willard v. Tayloe, 8 Wall. 567, 19 L. Ed. 504, Mr. Justice Field said: 'In general, it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice, and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for, if that result would follow, the court will leave the parties to their remedies at law.'

"In *Pope Mfg. Co v. Gormully*, 144 U. S. 224-236, 36 L. Ed. 414-419, 12 Sup. Ct. Rep. 632, 637, Mr. Justice Brown said: 'To stay the arm of a court of equity from enforcing a contract, it is by no means necessary to prove that it is invalid; from time immemorial it has been the recognized duty of such courts to exercise a discretion, to refuse their aid in the enforcement of unconscionable, oppressive, or in-

iquitous contracts, and to turn the party claiming the benefit of such contract over to a court of law.'

• • •

"In Mississippi & M. R. Co. v. Cromwell, 91 U. S. 643, 23 L. Ed. 367, Mr. Justice Bradley said: 'He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law.' "

In

Linsell vs. Halicki, 240 Mich. 483

the Court refused specific performance on the ground of unconscionableness where plaintiff on an investment of $2200 stood to realize a profit of more than $4300.

VII.

CONCLUSION

In affirming the order of the Lower Court in denying unto petitioners vacation of the decree in this cause entered, and which divested them of title to the valuable oil lands in this cause involved, the Supreme Court of the State of Michigan planted decision squarely upon the proposition that the decree as entered was in effect a consent decree which might not, therefore, be disturbed without the consent of the parties thereto, this court having entirely overlooked the fact that the basic question involved was that of abridging the Fourteenth Amendment to the Constitution of the United States of America, and which proposition was by this Court entirely disregarded.

In our view, before the rule of consent referred to by the Supreme Court of the State of Michigan could have application it would be and was necessary that the validity of that decree be first established, for if void for want of jurisdiction, as contended by appellants, the mere fact that the parties consented thereto was ineffective.

It is apparent from the citations of authority heretofore before this Court and also before the Supreme Court of the State of Michigan that it is always necessary that the relief granted be within the purview of the pleadings and the proofs adduced. Can that be truthfully said of the decree entered in the case at bar, and here now before this court for consideration? The bill of complaint was filed for the purpose of having certain documents construed as a mortgage obligation, and for an accounting and reference to that mortgage obligation, and the answer and cross-bill of the defendant-receiver admitting the mortgage obligation but claiming its default sought for a statutory foreclosure of that mortgage and accounting in reference to same. The proofs on the trial of this cause adduced and interrupted by the untimely death of the owner of the bank in question dealt entirely with the nature of the obligation in question, and the amount of money owing, if any, under same. Nowhere within these pleadings nor the proofs was there any assertion of ownership in fee simple to the lands in question to the bank or the bank-receiver, and nowhere within the pleadings or the proofs did the bank or the bank-receiver seek to obtain through these proceedings title in fee in these lands. As stated, all the bank receiver sought was the statutory foreclosure of the mortgage obligation in accord with the statute in such case made and provided. As the matter of the record stood at the time of the beginning of the trial in question there was but one question before the court for determination, inasmuch as the defendant and bank receiver had admitted that the documents under which they formerly were asserting title to the premises was in reality a mortgage obligation, and that single question was as to whether or not this mortgage obligation was in default, and as to whether or not through accounting in reference to same, the defendant was entitled to a decree for a statutory mortgage foreclosure which of course had that followed, would have given unto the plaintiffs their equity of redemption. However, none of this occurred. There was no full adjudication of the controversy on the merits, the parties instead thereof having sought to settle the controversy through a stipulated decree which would give unto the bank and bank receiver title in fee

in the premises involved, and in return for which plaintiffs were to receive $300 and a cancellation of the liability of $3,000, but which in the defendants' cross-bill had been asserted as $4496.10 (64). This was not an accounting suit, and we differ with both the trial court and the Supreme Court of the State of Michigan in their conclusions that the suit involved was an accounting suit which would permit of the entry of a decree granting relief not in the pleadings or proofs sought.

Under the Fourteenth Amendment to the Constitution of the United States of America, due process requires jurisdiction of the person, jurisdiction of the subject matter, and conformity of relief granted to that sought. It is our contention in this regard that these things were all missing. Firstly, at the time of the stipulation and entry of decree in this cause involved, there was no jurisdiction over all the parties, particularly the permanent receiver, H. L. Switzer, who at no time had entered the proceedings by intervention or court order as required by law and whose fatal omission in this regard the trial court did seek to cure through an entry of an order nunc pro tunc, made seven years or more after the entry of the decree in question, under no legal authority, quite contrary to the rule well established in Michigan that the province of a nunc pro tunc order is to perfect a record of judicial action taken but never to supply judicial action omitted. Surely it was never intended that the nunc pro tunc process was under any circumstances to be a cure-all for all legal ailments.

Secondly, there was no jurisdiction over the subject matter of the controversy for which decree was herein granted, for as above stated, the only thing in controversy under the issues as framed by the pleadings was as to whether or not the mortgage obligation asserted by the bank was in default, if so how much, to be determined on an accounting, and if in default, then a statutory mortgage foreclosure. The question of passing title in fee to the lands here involved to the bank or bank receiver was not within the purview of the pleadings or proofs as filed and adduced. The land itself was in no manner involved

in the controversy, but only the right to enforce a mortgage foreclosure thereon.

Lastly, and most important of all, it is most apparent that in granting under this stipulated decree ownership in fee to the premises involved to the bank receiver, relief not prayed for and not within the purview of the pleadings and the proofs was unto the bank receiver granted.

All of these things, want of jurisdiction over the person, want of jurisdiction over the subject matter, granting relief not sought, were present in the case at bar, but whether all present or not, if any one was present, the effectiveness of the United States Supreme Court decisions, as we read them, have full application. And in applying these principles to the case at bar, it must also be remembered that we are here dealing with a most unconscionable transaction, an instance where for the disproportionate sum of $300 the bank receiver acquired lands worth at least a million dollars (which figure he undoubtedly will deny) but which he at least asserts is necessary for the payment of $160,000 depositor obligations (132-142). A situation, which under the Fourteenth Amendment of the Constitution of the United States of America, if permitted to stand, would certainly deny the equal protection of the law therein required.

If, therefore, the decree as entered in the court below which the Trial Court refused to vacate, and which refusal was by the Supreme Court of the State of Michigan affirmed, is void for want of jurisdiction in that same was in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, both as to want of "due process" and "equal protection of the law" then manifestly under the decisions of this Court and the Michigan Courts there could be no vesting by consent, and the mere fact that there was such consent, as found by the Michigan Supreme Court, would here afford the appellee of no benefit.

VIII.

RELIEF SOUGHT

The order of the Supreme Court of the State of Michigan affirming order of the Trial Court denying appellants' petition to set aside and vacate the stipulation and decree in question should be reversed, and the Writ of Certiorari as prayed for in application here filed should issue, in order that all matters involved may be properly presented to this Court.

Respectfully submitted,

HARRY J. LIPPMAN,
Attorney for Petitioners.